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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. JONAS MONTELL WASHINGTON, Defendant and Respondent.	B194035 (Los Angeles County Super. Ct. No. BA288086)

APPEAL from an order of the Superior Court of Los Angeles County. Frederick N. Wapner, Judge. Reversed and remanded.

Steve Cooley, District Attorney, Phyllis Asayama, Patrick D. Moran and Cassandra Hart-Franklin, Deputy District Attorneys for Plaintiff and Appellant.

Janice Y. Fukai, Alternate Public Defender of Los Angeles County, Felicia Kahn Grant and Aronda Anne Hurst, Deputy Alternate Public Defenders for Defendant and Respondent.

Plaintiff and appellant the People of the State of California appeals from a dismissal following the granting of a motion to suppress filed pursuant to Penal Code section 1538.5[1] by defendant and respondent Jonas Washington. Appellant contends that the trial court erred in suppressing both defendant's statement that he had some crystal and the methamphetamine recovered from defendant's pocket. Conceding that defendant was in custody at the time he was questioned and that he did not receive the warnings required by *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), appellant asserts that all suppressed evidence was admissible under the officer safety exception to *Miranda*. Alternatively, appellant argues that the methamphetamine was admissible as the fruit of an unwarned but voluntary statement.

We reverse. The officer's custodial interrogation was not investigatory in nature and was permissible by the officer safety exception to the *Miranda* rule. Therefore, both the statement and the methamphetamine itself should not have been suppressed.

FACTUAL AND PROCEDURAL BACKGROUND

On August 4, 2005, Los Angeles Police Department Officer Joe Dunster and his partner Officer James Fillmore responded to a radio call at approximately 9:00 p.m. According to the call, a man at a pay telephone located at 6707 Santa Monica Boulevard had called 911 and wanted officers to respond so he could shoot them with an AK–47 rifle. That location is a strip mall with three small businesses—a laundromat, donut shop and 7-Eleven. Officer Dunster was less than one mile from the address when he heard the call, and it took him approximately four minutes from the time of the 911 call to arrive. Officer Paul Shearholdt and his partner also heard the radio call and arrived on the scene at about the same time. Ultimately, six units responded to the call.

When the officers first saw defendant, he appeared to be speaking on one of two pay telephones with his back toward the officers. There were no other people near the telephones. Officer Dunster and Officer Fillmore opened their car doors and crouched

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

behind them; they drew their weapons and Officer Fillmore ordered defendant to put his hands in the air, face away from the officers, go to his knees and lie down on his stomach, spreading his arms and legs out. Defendant complied. At that time, the officers believed they were dealing with the threatening caller, who potentially was violent and had a weapon.

With Officer Dunster providing cover, Officer Shearholdt and Officer Fillmore approached defendant. Officer Shearholdt then handcuffed defendant, stood him up and walked him back to one of the police cars. Defendant complied with all commands and said nothing threatening to the officers. Neither Officer Dunster nor Officer Shearholdt saw any weapon on defendant when he was lying prone on the ground.

When they arrived at the police car, Officer Shearholdt then asked defendant "if he had any guns or weapons or anything on him that I should know about." He asked that question for his own safety; in his experience individuals would tend not to disclose items such as razor blades, needles or small knives in response to an inquiry limited to weapons. Defendant responded that he had some "crystal." Officer Shearholdt understood that term to mean crystal methamphetamine. He asked defendant where it was located, and defendant indicated a pocket from which Officer Shearholdt retrieved the narcotics.

In a one-count information filed in September 1, 2005, defendant was charged with violating Health and Safety Code section 11378, possession for sale of a controlled substance. Defendant was arraigned on September 1, 2005 and pleaded not guilty.

In November 2005, defendant filed a motion pursuant to section 1538.5 to suppress both defendant's statement and the methamphetamine. After several continuances, the trial court heard and granted the motion on February 6, 2006. On February 8, 2006, appellant declared it was unable to proceed with defendant's prosecution, and the trial court dismissed the case pursuant to section 1385. The matter was immediately refiled pursuant to section 1387.2; defendant was arraigned and pleaded not guilty.

On March 24, 2006, defendant filed a second motion to suppress pursuant to section 1538.5. The trial court heard the motion on July 28, 2006 and again granted it, suppressing both defendant's statement and the methamphetamine. It ruled that defendant was in custody at the time he was questioned and that Officer Shearholdt's inquiry as to whether defendant had "anything [he] should know about" should have been preceded by *Miranda* warnings because the question was not limited to safety concerns. Later that same day, appellant declared it was unable to proceed and the trial court dismissed the case.[2] Appellant thereafter appealed from the order granting the motion to suppress and dismissing the case.

DISCUSSION

Appellant contends that the trial court erred in granting the motion to suppress because Officer Shearholdt's questioning defendant without first providing *Miranda* warnings was required for the officer's and the public's safety. Appellant further contends that, at a minimum, the trial court erred in suppressing the methamphetamine because it was recovered as a result of an unlawful but noncoerced statement. "An appellate court applies the independent or de novo standard of review, which by its nature is nondeferential, to a trial court's granting or denial of a motion to suppress a statement under *Miranda* insofar as the trial court's underlying decision entails a measurement of the facts against the law. [Citations.] As for each of the subordinate determinations, it employs the test appropriate thereto." (*People v. Waidla* (2000) 22 Cal.4th 690, 730.) We "'accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported,'" but examine independently the resolution of pure questions of law. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033; accord, *People v. Waidla*, *supra*, at p. 730.)

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[2] In December 2006, the trial court corrected its July 28, 2006 minute order to reflect that the dismissal was pursuant to section 1385, not section 1382.

Applying these principles here, we conclude that neither the methamphetamine nor the statement should not have been suppressed.[3]

I. The Defendant's Statement Should Not Have Been Suppressed Because It Was Obtained As an Exception to *Miranda*.

In *Miranda*, *supra*, 384 U.S. at pages 467–471, the United States Supreme Court concluded that before a suspect may be subjected to custodial interrogation, he or she must be advised of certain procedural rights. "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of any attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." (*Id*. at p. 479.) These standard admonishments are required when there is a custodial interrogation, defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (*Id*. at p. 444, fn. omitted.) Pursuant to *Miranda*, a defendant's statements made in response to custodial interrogation are generally not admissible unless the defendant was given *Miranda* warnings. (*Ibid.*; *People v. Sims* (1993) 5 Cal.4th 405, 440.)

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[3] Initially, defendant sought to suppress his statement and the methamphetamine on the ground that they were obtained as the result of an unlawful detention or arrest in violation of the Fourth Amendment. During the course of the hearing, the focus of the motion shifted to the *Miranda* violation, which involves the protection of rights afforded under the Fifth Amendment. (See *People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1170.) We recognize that "'[s]ection 1538.5 may not be used to suppress admissions and confessions on grounds that they are the product of Fifth Amendment and/or Sixth Amendment violations.' [Citations.]" (*People v. Whitfield* (1996) 46 Cal.App.4th 947, 958.) Rather, a motion to suppress a statement elicited in violation of *Miranda* is appropriately the subject of an evidentiary motion under Evidence Code section 402. (*People v. Whitfield, supra*, at pp. 958–959; *People v. Temple* (1995) 36 Cal.App.4th 1219, 1223.) Because the section 1538.5 motion originally concerned Fourth Amendment protections, and because appellant never asserted this procedural deficiency as a basis for denying the motion, we will consider the merits of the motion to suppress.

Here, the trial court found and appellant has conceded that defendant was in custody when Officer Shearholdt questioned him and that, therefore, the provisions of *Miranda* are applicable. Despite this concession, appellant asserts that Officer Shearholdt was not required to provide *Miranda* warnings before questioning defendant by reason of the "public safety" exception to the *Miranda* rule articulated in *New York v. Quarles* (1984) 467 U.S. 649 (*Quarles*). In *Quarles*, the defendant, who had been identified as an armed rapist, was pursued through a market by police and apprehended. An officer frisked him and found an empty shoulder holster. After handcuffing the defendant but before giving him *Miranda* warnings, the officer asked him where the gun was. The defendant answered, "'the gun is over there,'" nodding in the direction of some empty cartons. (*Quarles, supra*, at p. 652.)

The United States Supreme Court held that where police questioning is prompted by a legitimate concern for public safety, statements made by defendants who are subjected to such questioning are not excluded from evidence under *Miranda*. In reaching this holding, the court did not want to place law enforcement officers "in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask [about safety matters] without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them." (*Quarles, supra*, 467 U.S. at pp. 657-658, fn. omitted.) By recognizing a narrow public safety exception, the court "lessen[ed] the necessity of that on-the-scene balancing process" and "free[d officers] to follow their legitimate instincts when confronting situations presenting a danger to the public safety." (*Id*. at pp. 658, 659, fn. omitted.) It concluded that the exception would not be difficult to apply because it believed that "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." (*Id*. at pp. 658–659.)

In *People v. Cressy* (1996) 47 Cal.App.4th 981 (*Cressy*), the court applied *Quarles* to a situation where only officer safety was at issue, noting that it was a matter of first impression in this state but had been previously addressed in *U.S. v. Carrillo* (9th Cir. 1994) 16 F.3d 1046, 1049-1050 (*Carrillo*). In *Cressy*, an officer arrested the defendant after observing a syringe fall from his hands during a traffic stop. Before searching the defendant incident to the arrest, the officer asked him if he "had any other needles or paraphernalia on his person," and the defendant responded that he had a "quarter"—meaning a quarter gram of narcotics—in his pocket. (*Cressy, supra*, at p. 985.) The appellate court affirmed the admissibility of the statement under the public safety exception to *Miranda*, explaining that *Quarles* had indicated "that the safety of officers was a valid consideration under the 'public safety' exception" and that officers should be permitted to make a "narrow inquiry" to avoid potentially serious injury from a search that risks exposing them to a contaminated needle, razor, or other sharp object. (*Cressy, supra*, at pp. 987, 989; accord, *Carrillo, supra*, at pp. 1049-1050 [the defendant was in a detention center after having been arrested on drug charges, when he was asked, pre-*Miranda*, whether he had any drugs or needles on his person. Defendant responded, "No, I don't use drugs, I sell them" (p. 1049). Admission of the statement by the trial court was upheld on the theory that the officer's inquiry "stemmed from an objectively reasonable need to protect himself from immediate danger" (p. 1049). That court noted that though the risk of contact with syringes or toxic substances differs from that of a gun, "the danger of transmission of disease or contact with harmful substances is real and serious enough" (p. 1049) and concluded that the non-investigatory nature of the officer's question further supported admission of the statement. "The question called for a 'yes' or 'no,' not a testimonial response" (pp. 1049-1050). Additionally the court observed that the officer did not ask any further questions and "[a]lthough the test is an objective one, the officer's deliberate refusal to pursue the subject heightens our confidence that, in this case, the narrowly tailored question was a reasonable attempt by a police officer to insure his personal safety in the midst of a search" (p. 1050)].)

Appellant contends that the circumstances here are no different than those in *Cressy*, as Officer Shearholdt testified that he asked whether defendant had any weapons or anything he should know about to protect his own safety. We agree. Here Officer Shearholdt asked defendant whether he had any guns or weapons or anything on him that the officer should know about. It was a single question designed to determine whether the defendant had any dangerous items such as razor blades, needles, or small knives on his person before the officer patted the defendant down for weapons as part of a *Terry*-search.[4] *Miranda* cannot be used to preclude an officer from protecting himself from harm. There was nothing in Officer Shearholdt's question designed to elicit incriminating statements or a confession. The phrase "or anything I should know about" in the context of guns and weapons, clearly is limited in scope.

II. The Methamphetamine Should Not Have Been Suppressed.

Since we find no violation of *Miranda*, we find no basis for the suppression of the methamphetamine on that theory. We further reject defendant's contention that the methamphetamine should be suppressed because his statement was, in fact, coerced. He asserts that the circumstances surrounding his questioning—that the police had earlier pointed weapons at him, that he was handcuffed and that multiple police cars appeared—established a coercive atmosphere. In *People v. Brewer* (2001)81 Cal.App.4th 442, the court ruled that similar circumstances were not indicative of coercion. There, as here, at the time the defendant was questioned in violation of *Miranda*, he was handcuffed and had been in the backseat of a police car, but was not threatened, was offered no inducements to obtain specific statements and was not subjected to lengthy, abusive or intimidating interrogation. (*Brewer, supra*, at p. 456.) Although the defendant in *Brewer* never had a weapon pointed at him, at the time defendant was questioned here officers did not have their weapons drawn. (*Ibid*.) Accordingly, we reach the same conclusion as the *Brewer* court: "We find nothing in this record that indicates that psychological or

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[4] *Terry v. Ohio* (1968) 392 U.S. 1.

physical coercion took place that overcame defendant's will and rendered his statements to [Officer Shearholdt] involuntary." (*Id.* at p. 456.)

We likewise reject defendant's contention that the methamphetamine should be suppressed because it was obtained in violation of defendant's Fourth Amendment rights as a result of a prolonged detention or de facto arrest without probable cause. "'[T]here is no hard and fast line to distinguish permissible investigative detentions from impermissible de facto arrests. Instead the issue is decided on the facts of each case, with focus on whether the police diligently pursued a means of investigation reasonably designed to dispel or confirm their suspicions quickly, using the least intrusive means reasonably available under the circumstances.'" (*People v. Celis* (2004) 33 Cal.4th 667, 674–675.) In making this assessment, courts consider the "'duration, scope and purpose' of the stop." (*Id.* at p. 675.)

The record demonstrates that the officers were entitled to conduct a brief investigative detention because there was some objective manifestation that criminal activity was afoot and that defendant was engaged in that activity. (*People v. Souza* (1994) 9 Cal.4th 224, 230.) Moreover, the detention was not lengthy, lasting only a few minutes. That defendant was stopped at gunpoint and handcuffed did not transform the detention into a de facto arrest. (See *People v. Celis, supra,* 33 Cal.4th at p. 675 ["stopping a suspect at gunpoint, handcuffing him, and making him sit on the ground for a short period, as occurred here, do not convert a detention into an arrest"]; *People v. Soun* (1995) 34 Cal.App.4th 1499, 1517 [no de facto arrest where the defendant "was removed from the car at gunpoint by a large number of police officers, was forced to lie on the ground, was handcuffed and placed in a patrol car, was transported from the site of the stop a distance of three blocks to a parking lot," where he was held for 30 minutes]; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 384 [no de facto arrest where "during a 30-minute detention appellant was subjected to a pat down search, was handcuffed, and was driven to the hospital" for identification by rape victim].) Because the discovery of the methamphetamine occurred during a permissible investigative detention and not an

impermissible de facto arrest, the Fourth Amendment affords no basis for suppression of the narcotics.

DISPOSITION

The trial court's order suppressing defendant's statement, any testimonial act, and the methamphetamine is reversed and the matter is remanded.

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_____, J.
CHAVEZ

I concur:

_____, P. J.
BOREN

DOI TODD, J.

I concur.

I write separately because I would limit the scope of the remand, affirming the suppression of defendant's statement and reversing only the suppression of the methamphetamine for the reasons set forth by the majority.

The application of the public safety exception to *Miranda v. Arizona* (1966) 384 U.S. 436 under the circumstances presented here constitutes an unwarranted extension of that narrow exception. Indeed, the court in *People v. Cressy* (1996) 47 Cal.App.4th 981 expressly contemplated that its holding might be applied too broadly and cautioned against the type of conduct the majority sanctions: "Our holding should be narrowly applied. It presupposes there is legal justification for a search. If justification is lacking, well-articulated Fourth Amendment principles apply and a person's reply to questioning may not be relied upon to justify an otherwise improper intrusion. In addition, inquiry must be narrowly tailored to prevent potential harm. Questions about needles or other potentially contaminated sharp objects would be permissible. *General questions like 'What's in your pockets?' are overly broad*. Allowable questions may only address the presence of items that might be harmful if they were seized without anticipation and particular caution. Questions about drugs in general, most firearms or similar kinds of seizable, but not immediately dangerous, items would fall outside this narrow exception." (*Id.* at p. 989, italics added.)

I find no basis for applying the public safety exception to *Miranda.* Neither the public nor the officers were in any immediate danger, as defendant was handcuffed and had cooperated fully with the officers' commands. Though Officer Shearholdt may have subjectively intended to limit the scope of his inquiry to weapons or sharp objects, his question was not narrowly tailored to prevent potential harm arising from such objects. Rather, the officer's asking whether there was anything he should "know about" was no different than the prohibited "'[w]hat's in your pockets'" inquiry. (*People v. Cressy, supra*, 47 Cal.App.4th at p. 989.)

Moreover, the fact that the officers may have been entitled to conduct a patdown search of defendant pursuant to *Terry v. Ohio* (1968) 392 U.S. 1 does not justify application of the public safety exception. According to *Terry*, an officer "is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." (*Id*. at p. 30.) A carefully limited search of defendant's outer clothing would not have put the officers at risk of directly encountering any sharp objects in defendant's pockets. And nothing in the record indicates that defendant would have been subjected to a more intrusive search incident to arrest. (See *U.S. v. Carrillo* (9th Cir. 1994) 16 F.3d 1046, 1049 [public safety exception to *Miranda* applied to officer's question whether the defendant had any drugs or needles on him, which was asked immediately preceding a search incident to arrest].) The trial court here observed that the limited investigation that had been conducted would not have justified an arrest and further acknowledged that the officers' testimony was ambiguous and inconclusive on the question of whether defendant would have been arrested and searched absent the discovery of the methamphetamine.

Because Officer Shearholdt's overly broad inquiry cannot be justified by *Miranda*'s public safety exception, I would conclude that defendant's statement was obtained in violation of *Miranda*.

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DOI TODD, J.